Supreme Court, U.S.
FILED

No. 110088 DEC 17 2001

In The

Supreme Court of the United States

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GEORGE E. KERSEY,

Petitioner,

v.

JAMES L. DEHART, ESQ.
NEW HAMPSHIRE PROFESSIONAL CONDUCT COMMITTEE (PCC)

Respondent.

◊

On Petition for Writ of Certiorari
To The Supreme Court of New Hampshire

◊

George E. Kersey
P.O. Box 2006
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Pro Se

24pp

QUESTIONS PRESENTED FOR REVIEW

This Petition presents the following questions:

I. *WHETHER* New Hampshire properly (App. 1) adopted the wrongly-imposed Massachusetts discipline (App. 4).

II. *WHETHER* a three-month suspension from the practice of law in Massachusetts for contempt of the Vermont Family Court, where the attorney was not Admitted to practice, rather than the private reprimand imposed in the most nearly comparable case, was an appropriate sanction and should have been applied in New Hampshire.

III. *WHETHER* Petitioner's conduct is more severe than the conduct of the attorney in Mass. *Private Remand No.* PR-92-37, where the attorney was found in willful contempt of a child support order, but while the disciplinary proceeding was pending, the attorney paid a substantial portion or arrears in an attempt to comply with the court order. Here, while the disciplinary proceeding was pending, Petitioner also was in substantial compliance.

IV. *WHETHER* the sanction with a continued requirement to purge an outstanding contempt order after a suspension of three months is completely contrary to the Model Standards of the American Bar Association, which draw a distinction between suspensions for six months or less, and suspensions for more than six months, whereby a lawyer who has been suspended for six months or less should be reinstated automatically (i.e., without establishing rehabilitation). Model rules for Lawyer Discip. Enforcement 24.

LIST OF PARTIES

1. GEORGE E. KERSEY, Petitioner

2. JAMES L. DEHART, ESQ.
NEW HAMPSHIRE PROFESSIONAL
CONDUCT COMMITTEE (PCC), Respondent.

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PETITION FOR WR[illegible]F CERTIORARI

Petitioner respectfully requests that a writ of certiorrari issue to review the judgment of the Supreme Court of New Hampshire in its case No. LD-2001-006 In the Matter of George E. Kersey, A decision by the New Hampshire Supreme Court was entered September 20, 2001, and a Petition for Rehearing was subsequently denied.

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OPINION BELOW

The opinion of the New Hampshire Supreme Court is reported and reprinted in the Appendix to this Petition Commencing at page App. 1.

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JURISDICTION

This Court has jurisdiction over the judgment of The New Hampshire Supreme Court by virtue of 28 U.S.C., Section 1254.

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THE CONSTITUTIONAL PROVISIONS, STATUES AND RULES

U.S. Constitution, Amendment V and XIV

"No person shall . . . be deprived, of life, liberty or property, without due process of law."

"No state shall . . . deny to any person . . . the equal protection of the laws."

28 U.S.C. 1254 (Courts of appeals; certiorari; appeal; certified questions).

◊

STATEMENT OF THE CASE

This is an action for discipline in New Hampshire against Petitioner based upon discipline wrongfully imposed by Massachusetts in *The Matter of George E. Kersey*, where the Supreme Judicial Court falsely distinguished Petitioner's case from that of a private reprimand PR-92-37 by wrongly contending that unlike the case of the private reprimand, Petitioner had made no attempt to comply with an outstanding Vermont contempt Order while disciplinary proceedings were pending.

Petitioner sought review of the Massachusetts decision in this Court but his Petition was denied. There followed a reciprocal disciplinary action in New Hampshire with Petitioner given an opportunity to show cause why the Massachusetts discipline should not be imposed. The New Hampshire Supreme Court ignored the reasons given by Petitioner of the non-imposition of the Massachusetts diseipline, and instead, summarily imposed the same wrongful Massachusetts discipline.

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REASONS FOR GRANTING THE WRIT

This Court should grant the writ because New Hampshire made the following errors:

1. New Hampshire imposed the same discipline as Massachusetts, despite Petitioner's showing that a private reprimand was the most appropriate sanction in Massachusetts, but the Massachusetts Court wrongly stated that the conditions of the private reprimand did not apply.

2. In any event, New Hampshire should have applied Model Rule for Lawyer Disciplinary Enforcement 24 that a lawyer who has been suspended for six months or less should be reinstated automatically (i.e., without establishing rehabilitation).

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SUMMARY OF ARGUMENT

PETITIONER HAS BEEN DEPRIVED OF *DUE PROCESS and EQUAL PROTECTION*. The suspension in New Hampshire is based upon an inappropriate suspension of Kersey in Massachusetts which wrongly imposed discipline that is "markedly disparate from sanctions imposed in similar cases", contrary to the *Matter of Garabedian*, 416 Mass. 20, 24 (1993). See *Matter of Tobin*, 417 Mass. 81, 88 (1994).

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ARGUMENT

POINT I

THE RECIPROCAL IMPOSITION BY NEW HAMPSHIRE OF THE MASSACHUSETTS DISCIPLINE UPON PETITIONER, GEORGE E. KERSEY ("KERSEY"), WAS WRONGFUL BECAUSE KERSEY FULLY DEMONSTRATED TO NEW HAMPSHIRE THAT MASSACHUSETTS VIOLATED ITS OWN LAW BY IMPOSING A DISPARATE DISCIPLINE

The New Hampshire Committee on Professional Conduct filed a petition for reciprocal discipline against Kersey based upon his expired suspension from the practice of law in Massachusetts. Kersey therefore objected to the New Hampshire petition for a number of reasons, including the fact that under Massachusetts law of *Matter of Garabedian*, any discipline imposed should not be more stringent than that imposed in a comparable case of PR-92-37, where a Massachusetts attorney, who was admitted in Florida, was found in contempt of the Florida courts for failure to pay child support. Massachusetts imposed reciprocal discipline of a private reprimand in that case on the basis that although the Florida attorney had not fully complied with the contempt order, he had done so partially, and that partial compliance was sufficient to warrant a private reprimand.

In Kersey's case, which began as a divorce action in Vermont, where Kersey was not admitted to practice, there were three contempt orders. The first two were for failure to pay monies that Kersey did not have, with the first contempt being abated by an order that the amount should be paid from Kersey's share of the marital estate. The second contempt was based upon an alleged failure to pay the proper percentage of Kersey's income because he had excluded from his gross, the amounts paid on behalf of clients. While Kersey was making this argument, he was ordered arrested in court and placed in confinement until he borrowed monies to pay the amount that was needed although improperly assessed.

The third contempt involved a failure to submit documentation, all of which has been supplied as evidenced by the materials previously submitted to the New Hampshire Court in the form of Exhibits attached to Kersey's prior response to New Hampshire. Indeed, one of the documents submitted was a transcript of a hearing where Kersey was allowed to participate by telephone and Kersey's ex-wife acknowledged that Kersey had met all of the requirements as of 1993 of the third contempt order, dated 1993.

The Massachusetts Court improperly attempted to distinguish Kersey's case from the private reprimand by stating that, in the private remand, there had been a partial attempt to comply with the contempt order, where as in Kersey's case, there was none.

While the Committee filed a report indicating that Kersey had not purged himself of contempt in Vermont *de jure*, the evidence submitted to Massachusetts, and to New Hampshire, shows that Kersey has complied *de facto*, and thus, should have received a private reprimand in Massachusetts.

Moreover, the suspension of Kersey in Massachusetts was for a period of three months, which has long since expired. While it is true that Kersey did not apply for reinstatement in Massachusetts, the proper designation

of his status in Massachusetts is not reinstated.

Even though the Massachusetts decision was based upon the incorrect statement that Kersey had made no attempt to comply with the orders of the Vermont Court, the request for reciprocal discipline, based on the incorrect Massachusetts decision, was sent to other jurisdictions. In New York, for example, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (App. 9), recognized that the events underlying the Massachusetts discipline did "not arise from the respondent's practice of law" (in Vermont where Kersey was not admitted to practice) and "that in view of the respondent's effort to resolve his legal problems in Vermont, the discipline imposed upon the respondent in New York is limited to a public censure". A copy of the Opinion and Order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is attached.

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CONCLUSION

Petitioner has been deprived of his Constitutional rights by being threatened with imprisonment if he appeared to defend himself in Vermont. He has been denied equal protection of the laws by a sanction that is markedly disparate from the most nearly comparable case.

The authority cited does not warrant discipline that has been imposed in the present case.

Respectfully submitted,

GEORGE E. KERSEY
P.O. Box 2006
Salem, NH 03079
(603) 279-5155

App. 1

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

ORDER

LD-2001-006,
In the Matter of George E. Kersey

The Committee on Professional Conduct filed a petition for reciprocal discipline of respondent, Attorney George E. Kersey of Salem, New Hampshire. The respondent filed an objection to the petition. By order dated June 6, 2001, the court ordered the committee to file a report with the court advising it whether the respondent had purged himself of contempt in the Vermont courts and whether the respondent had been reinstated to the practice of law in Massachusetts. The committee filed a report, with supporting documentation, indicating that the respondent had not purged himself of contempt in the Vermont courts and had not been reinstated to the practice of law in Massachusetts. The respondent filed a response arguing that the imposition of discipline was not justified and requesting that the prayers for relief contained in the petition be denied.

The pleadings filed by the parties demonstrate that the Vermont courts adjudicated the respondent in contempt of court on three occasions for willful violations of court orders. Although the respondent contends that he since has complied with the terms of the court orders, he has failed to demonstrate that he has purges himself of contempt in the Vermont courts. He also failed to rebut the committee's showing that his suspension from the practice of law in Massachusetts remains in effect. In accordance with Supreme Court Rule 37(10), the court concludes that the imposition of identical discipline is appropriate in this case. Accordingly, the court order as follows:

(1) Attorney Kersey is hereby suspended from the practice of law in New Hampshire for a period of three months. The suspension shall be effective thirty days from the date of the clerk's notice of this order. Attorney Kersey shall not accept any new retainer or engage as

lawyer for another in any new case or legal matter of any nature after receipt of this order. During the period between Attorney Kersey's receipt of this order and the effective date of the suspension, Attorney Kersey may wind up and complete, on behalf of any client, all matters which were pending prior to his receipt of the order.

(2) A petition for reinstatement shall not be accepted for filing by the supreme court until such time as Attorney Kersey has purged himself of contempt in the Vermont courts.

(3) Pursuant to Supreme Court Rule 37(14) the supreme court hereby appoints Attorney James E. Townsend of Londonderry to take possession of Attorney Kersey's client files and trust account, to make an inventory of such files and trust accounts, and to take such action as is necessary to protect the interests of Attorney Kersey's clients. Attorney Townsend shall take possession of Attorney Kersey's client files and trust accounts no later that October 20, 2001, and shall take the following actions:

a. review Attorney Kersey's client files and trust accounts and take such actions as he deems necessary to protect the interests of the clients as well as the interest of Attorney Kersey;
b. notify the clients by certified mail, return receipt requested, of Attorney Kersey's suspension, inform them of any action which appears to be required in the immediate future in order to preserve their legal rights and advising them that they should obtain the services of lawyers of their choice; and
c. make an inventory of Attorney Kersey's client files and trust account and file a copy of the inventory with the supreme court on or before November 19, 2001, together with a report of his actions taken under this order and a recommendation as to what further actions should be taken to protect the interest of Attorney Kersey' clients.

(4) The fees of Attorney Townsend shall be paid in the first

instance by the professional conduct committee, to be reimbursed by Attorney Kersey unless otherwise ordered by the court.

(5) Attorney Kersey is assessed all expenses incurred by the Committee on Professional Conduct in the investigation and prosecution of this matter.

(6) A copy of this order shall be served on Attorney Kersey by certified mail, return receipt requested, restricted delivery;

Brock, C.J. and Broderick, Nadeau, Dalianis, and Guddan, JJ., Concurred.

DATE: September 20, 2001

ATTEST:

_____

Howard J. Zibel, Clerk
Distribution:
Clerks of Court
George E. Kersey, Esquire
James L. DeHart, Esquire, PCC
Laura Mitchell, Supreme Court
Deborah A. Bills, Supreme Court
NH Bar News
File

App. 4

IN RE KERSEY

Cite as 733 N.E.2d 545 (Mass. 2000)

432 Mass. 1020
In the Matter of GEORGE E. KERSEY.

Supreme Judicial Court of Massachusetts.

August 15, 2000

Terence M. Troyer, Assistant Bar Counsel

George E. Kersey, pro se.

RESCRIPT.

The respondent, George E. Kersey, appeals from an order of a single justice suspending him from the practice of law for three months and requiring him to purge an outstanding contempt order before re-instatement. We affirm.

We have reviewed the entire record before the Board of Bar Overseers (board) and the single justice. An outline of the essential facts is as follows. In May, 1991, the respondent's wife filed a complaint for divorce in the Vermont Family Court. During the course of the divorce and related proceedings, the court adjudicated the respondent in contempt on three occasions for willful violations of court orders. On April 20, 1993, the court ordered the respondent to provide his wife with various financial records and transfer ownership of certain stock to her in order to purge the contempt. The respondent has failed to comply with this order; a warrant for his arrest was outstanding at the time of the disciplinary hearings, and remains outstanding. The panel hearing the matter recommended that the respondent be suspended

for one month. The board recommended that the respondent be suspended for a three month period which, after a hearing, the single justice affirmed.

The respondent claims that the board erred in concluding that, by repeatedly violating court orders entered in his divorce action, he violated S.J.C. Rule 3:07, Canon 1, DR Rules 1-102(A) (5) and (6), and Canon 7, DR 7-106 (A), as appearing in 382 Mass. 787 (1981). There is no merit to this claim. By persisting in continued and willful contempt of lawful court orders during the course of a personal divorce proceedings, the respondent clearly disregarded the rulings of a tribunal and engaged in conduct that was prejudicial to the administration of justice and adversely reflected on his fitness to practice law.

The respondent further contends that the sanction imposed by the single justice was unduly harsh. We review de novo the appropriate level of discipline; the sanction is not to be markedly disparate from what has been ordered in comparable cases. See *Matter of Doyle*, 429 Mass. 1013, 1013, 710 N.E.2d 955 (1999); *Matter of Kennedy*, 428 Mass. 156, 156, 697 N.E.2d 538 (1998). How-ever, "[w]hile the review is de novo in the sense that no special deference is given to the single justice's determination, we, like the single justice before us, must be 'mindful that the board's recommendation is entitled to substantial deference.'" *Matter of Doyle, supra*, quoting *Matter of Tobin*, 417 Mass. 81, 88, 628 N.E.2d 1268 (1994).

Applying these principles, we conclude that the three month suspension was not markedly disparate from the results reached in similar cases. The disciplinary cases involving an attorney's contempt of court orders entered

in their own divorce or related proceedings range from a private reprimand, *Private Reprimand* No. PR-92-37, 8 Mass. Att'y Discipline Rep. 334 (1992), to a one year Suspension, *Matter of Okai*, 11 Mass. Att'y Discipline Rep. 187, 188-189 (1995).

The respondent, relying on *Private Reprimand No. PR-92-37, supra*, contends that a private reprimand is the appropriate sanction. We have since recognized, however, that the appropriate discipline for "knowing violations of court orders, violations which caused injury to a party to the litigation or interfered with a legal proceeding, is a suspension . . . in order to demonstrate to the public and the bar that substantial, repeated contempt of court . . . is serious and requires stronger discipline than a public reprimand." Matter of Ring, 427 Mass. 186, 192, 692 N.E.2d 35 (1998). The three-month suspension recommended by the board and imposed by the single justice, therefore, was an appropriate sanction. The length of the suspension was not markedly disparate from that imposed in similar cases. *See id., supra* (suspending attorney from practice of law for three months for repeatedly disobeying court orders resulting in seven separate adjudictions for contempt where evidence existed that attorney was suffering from emotional trauma at time of divorce); *Matter of Okai, supra* (suspending attorney for one year after he had been adjudicated in contempt on four separate occasions for repeatedly disobeying court orders, neglecting client, and failing to segregate client advance and refund unused balance); *Matter of Hodges*, 11 Mass. Att'y Discipline Rep. 116, 118 (1995) (suspending Respondent for three months after he had been adjudged in contempt on five occasions for repeated failure to pay

court-ordered child support, neglected client, and failed to account for or refund to client unearned fees). *Cf. Matter of Finnerty*, 418 Mass. 821, 829, 830 641 N.E.2d 1323 (1994) (suspending attorney for six months for intentionally misrepresenting his financial worth to court as several hundred dollars less than amount of which he was aware). Moreover the respondent's conduct is more severe than the conduct of the attorney in *Private Reprimand No. PR-92-37, supra*. There the attorney was found in willful contempt of a child support order, but while the disciplinary proceeding was pending, the attorney paid a substantial portion of arrears in an attempt to comply with the court order. The respondent in this case has made no such attempt to comply.[1]

The order of the single justice is affirmed.

So ordered.

[1] The respondent's contention that his case is distinguishable because he violated a Vermont and not a Massachusetts court order does not merit discussion.

SUPREME COURT OF THE STATE
OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

6710B

C/jv

AD2d

LAWRENCE J. BRACKEN, P.J.
CORNELIUS J. O'BRIEN
DAVID S. RITTER
FRED T. SANTUCCI
LEO F. McGINITY, JJ.

2000-00842
In the Matter of George E. Kersey
an attorney and counselor-at-law.

Grievance Committee for the Second and
Eleventh Judicial Districts, petitioner;
George E. Kersey, respondent.

Motion by the petitioner pursuant to 22 NYCRR 691.3 to impose discipline on the respondent based upon disciplinary action taken against him by order of the Supreme Judicial Court for the Commonwealth of Massachusetts for Suffolk County, entered September 10, 1999. The respondent was admitted to the Bar in the State of New York on October 19, 1960, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

Diana Maxfield Kearse, Brooklyn, N.Y., for petitioner

George E. Kersey, Salem, N.H., respondent *pro se*.

PER CURIAM. By order of the Supreme Judicial Court For the Commonwealth of Massachusetts for Suffolk County, entered September 10, 1999, the respondent was suspended from the practice of law in that State for three months, with the condition that no petition for reinstatement would be considered until the respondent purged himself of contempt in the courts of the State of Vermont. On the petitioner's motion to impose discipline upon the respondent pursuant to 22 NYCRR 691.3 based upon the disciplinary action taken against him in Massachusetts, the respondent demanded a hearing at which consideration could be given to all of his defenses. By order of this court dated June 13, 2000, the motion was held in abeyance pending a hearing pursuant to 22 NYCRR 691.3(d) and the matter was referred to the Honorable Anthony P. Savarese, as Special Referee to hear and report.

This matter arises from a series of contempt orders and two arrest warrants issued by the Vermont Family Court during the respondent's divorce proceedings. One of the findings of contempt arose from the respondent's arrest and brief incarceration. The Vermont Family Court found the respondent in contempt for failing to pay a $1,000 sanction imposed for failure to comply with discovery requirements, to obey its order to disclose his income to his ex-wife, and to pay maintenance. Upon the finding of the Vermont Family Court that the respondent had the ability to pay, it ordered that he be arrested and committed to the custody of the sheriff until he paid $4,677.68. The respondent purged himself of the contempt by paying, in full, the overdue maintenance.

The respondent was again found in contempt in April 1993 for willful and contumacious failure to comply with orders requiring him to provide certain information and documentation to the ex-wife's attorney. The respondent has not purged himself of that contempt, and an arrest warrant is outstanding.

The Massachusetts Board of Bar Overseers found that the respondent's actions constituted conduct prejudicial to the administration of justice, conduct adversely reflecting on his fitness to practice law, and disregard for the ruling of a tribunal.

Upon the recommendation of the Massachusetts Board of Bar Overseers, the Supreme Judicial Court for

the Commonwealth of Massachusetts for Suffolk County (Ireland, J.), by order entered September 10, 1999, suspended the respondent from the practice of law in that State for three months, with the condition that no petition for reinstatement would be considered until the respondent has purged himself of the contempt in Vermont. The Grievance Committee for the Second and Eleventh Judicial Districts served the respondent with a notice pursuant to 22 NYCRR 691.3 apprising him of his right to set forth any of the defenses to the imposition of reciprocal discipline enumerated in 22 NYCRR 691.3(c).

In his verified response to this notice, the respondent maintained that he was wrongly held in contempt in Vermont, where he was never admitted to practice. The respondent, a patent attorney, was acting *pro se* in his Vermont divorce proceedings. He further maintains that the order of a single Justice of the Massachusetts Supreme Court does not represent a final decision inasmuch as the respondent appealed to the full bench of the Massachusetts Supreme Court. According to the respondent, the summary compile by the Massachusetts Board of Bar Overseers contains numerous errors. He argues that the Massachusetts decision violated the established standard of Massachusetts discipline and that any discipline imposed cannot be greater than that imposed in similar cases.

The respondent avers that he has fully complied with the outstanding Vermont order by providing copies of his 1990 tax returns, bank statements, billing and payment records, and stock transfer documents which were demanded of him. According to the respondent, the Massachusetts Board neglected to note that the contempt finding of the Vermont Family Court occurred while he was attempting to explain to the Judge that he had fully complied with the divorce decree by paying one-quarter of his gross receipts in accordance therewith. If the decree were interpreted to refer to adjusted gross receipts, the respondent would have no obligation to make any further payments. Instead, the Vermont Judge ordered the Sheriff to handcuff the respondent and escort him to the Vermont Correctional Institution where he was confined until he paid an additional $4,677.68, which he obtained after frantic telephone calls to friends.

Accordingly, the respondent asserts that the procedure in the Vermont jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process, that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court not accept the finding of the Vermont court as final, and that the imposition of discipline by this court would be unjust. The respondent demanded a hearing at which consideration could be given to all of the enumerated defenses. The respondent submitted documents which allegedly establish his de

facto compliance with the Vermont orders.

The Special Referee concluded that the respondent did not meet his burden of proof with respect to any of the three enumerated defenses. The respondent unequivocally admitted that he had notice and an opportunity to be heard in Massachusetts prior to the imposition of discipline. Upon the respondent's petition for review of the Massachusetts decision by a single Justice, the respondent was found not to have been in substantial compliance with the Vermont order. Under the circumstances, the Special Referee properly concluded that the respondent has not met his burden of proving manifest injustice or the denial of due process. The petitioner's motion to confirm the Special Referee's report is granted.

Inasmuch as the events underlying the Massachusetts discipline do not arise from the respondent's practice of law and in view of the respondent's efforts to resolve his legal problems in Vermont, the discipline imposed upon the respondent in New York is limited to a public censure.

BRACKEN, P.J., O'BRIEN, RITTER, SANTUCCI and McGINITY, JJ., concur.

ORDERED that the motion is granted; and it is further,

ORDERED that pursuant to 22 NYCRR 691.3, the respondent, George E. Kersey, is censured, based upon the discipline imposed upon him in Massachusetts.

ENTER:

James Edward Pelzer
Clerk

Supreme Court, State of New York
Appellate Division Second Dept.
I, James Edward Pelzer, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on September 10, 2001 and that this copy is a correct transcription of said original.
IN WITNESS WHEROF I have hereunto set my hand and affixed the seal of this Court on September 10, 2001.
James Edward Pelzer